



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-92-24

### FACTS:

You are an elected member of a municipal Board of Health (Board). You wish to know whether you may participate in votes and discussions concerning a proposal for a facility (the project) which would be adjacent to your neighborhood. You state that you recently sold a home in the area and that the value of that home was directly affected by the project. You also recently purchased a new home within the same area (further from the project but within the affected area) and have concluded that the purchase price was, in fact, affected by the operation of the project.

### QUESTIONS:

1. May you participate in votes or discussion involving the project?
2. Would the Rule of Necessity permit you to participate in matters involving the project if other members of the Board are also affected by the project?

### ANSWERS:

1. No, for the reasons stated below.
2. The Rule of Necessity, if properly invoked, would permit you to participate in matters involving the project, notwithstanding your foreseeable financial interest.

### DISCUSSION:

#### Section 19

Section 19 of c. 268A provides that a municipal employee may not participate<sup>1/</sup> as such a municipal employee in any particular matter<sup>2/</sup> in which to his knowledge he, his immediate family or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest. The financial interest may be of any size, and may either be positive or negative. *See, e.g., EC-COI-89-33; 89-19; 84-96.* If the municipal employee's financial interest will be affected either directly or foreseeably, the municipal employee must abstain from the matter in question. *See, e.g., 89-19; Commission Advisory No. 11 (Nepotism); see also Graham v. McGrail, 370 Mass. 133 (1976).* Participation in a particular matter includes both discussions and votes concerning the matter. *See Graham, 370 Mass. at 137-138. Graham v. McGrail* concludes that, while not required by law, it is advisable for the municipal employee to leave the room whenever he is prohibited from participating because of the restrictions of §19. *Id.*, 370 Mass. at 138.

You have informed us that the value of the home you recently sold (prior to your becoming a member of the Board) was directly affected by the project, as was the value of the home recently purchased by you in the same area. In light of your facts, it is reasonable to conclude that the value of the home recently purchased by you within the same area will continue to be affected by matters involving the project.<sup>3/</sup>

Consequently, you may not participate in votes or discussions concerning the project because it is reasonably foreseeable that your financial interest will be affected as a result of your continued home ownership in an area

near the project.

### **The Rule of Necessity**

As an elected member of the Board, you may participate in votes or discussions concerning the project only if the Board has occasion to properly invoke the so-called Rule of Necessity.<sup>4/</sup> See, e.g., *EC-COI-82-10*. That judge-made rule permits governmental bodies to act on matters when a quorum cannot be obtained because of Board members' conflicts of interest.<sup>5/</sup> Thus, the Rule of Necessity permits governmental bodies to act when they otherwise would have been forced to forego their governing responsibilities.

However, as *82-10* stated:

[t]he rule should only be utilized where so many members of a tribunal are disqualified that the body is incapable of acting because an insufficient number remain to constitute a quorum.

The Rule of Necessity is considered a rule of last resort and may not be invoked when a way can be found to provide a qualified tribunal, such as by excluding from the tribunal the disqualified member or by counting only the votes of the members who are qualified. 2 K. Davis, *Administrative Law*, §12.04; *EC-COI-82-10*. The mere absence of a quorum because of illness or absence of a member (for example) does not allow the Rule of Necessity to be invoked. See *Graham v. McGrail*, 370 Mass. at 138. Further, once a quorum has been obtained, the Rule of Necessity cannot be used to break a tie vote.

It is always advisable, although not required, that the Rule of Necessity be invoked by the Chairperson of the Board upon the written advice of town counsel, because a Board member would violate §19 if the Rule is improperly invoked. Town counsel's advice should provide the reasons why the Rule of Necessity is being used, and explicitly indicate that a quorum can be obtained only by invocation of the rule. (It is advisable for town counsel to establish guidelines, in advance, describing the circumstances under which the rule should be invoked.) The minutes of the Board should also indicate that the Board was unable to obtain a quorum because of the disqualification of members and, as a last resort, each of those disqualified members will now participate under the authority of the Rule of Necessity.

Accordingly, if other members of the Board also have conflicts of interest involving the same particular matter such that a quorum cannot be obtained,<sup>6/</sup> you may participate in matters involving the project even if the value of your home will be affected by your participation in the matter *once* the Rule of Necessity is properly invoked by the Board.

**Date Authorized: September 10, 1992**

<sup>1/</sup>"Participate," participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

<sup>2/</sup>"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

<sup>3/</sup>In an informal staff letter to you dated April 1, 1991, you were informed that you could submit additional information to this Commission which evidenced that your financial interest would not be affected by the project as a result of purchasing a new home in the area. Although you have now requested this formal Commission opinion, you have not asked the Commission to consider any additional facts concerning your financial interest. Thus, we must presume that you do not have any facts available which would indicate that your financial interest will not be affected by the project in question. Cf. *EC-COI-89-33* (presumption of financial interest can be rebutted by evidence to the contrary).

<sup>4/</sup>Section 19(b)(3) provides an exemption for municipal officials where the particular matter in question involves a determination of "general policy" and the financial interest of the municipal employee is shared with a substantial segment of the population of the municipality. However, we do not have sufficient facts in your case to make a determination under §19(b)(3). Consequently, based upon the facts presented to us, you may not rely upon the §19 exemption.

<sup>5/</sup>If the number for a quorum is not set by law, a quorum is generally considered to be a majority of the board's members.

<sup>6</sup>The conflicts of interest need not be the *same* conflict which you have. For example, if you serve on a three member Board and you cannot participate for the reasons stated above, and another member cannot participate because she has a direct interest in the project, the Rule of Necessity may be invoked. The Rule of Necessity would permit all three members of the Board to participate, notwithstanding the various potential conflicts of interest.